

cellular context, the procedure has been for the partitioned license term to begin anew from the date the partial assignment application is granted.²⁸³

109. In the *Report and Order*, we find that allowing parties acquiring a partitioned license or disaggregated spectrum to "re-start" the license term from the date of the grant of the partial assignment application could allow parties to circumvent our established license term rules and unnecessarily delay service.²⁸⁴ We seek comment as to whether our cellular and GWCS rules should be similarly amended to provide that parties obtaining partitioned cellular or GWCS licenses or disaggregated spectrum hold their license for the remainder of the original licensee's ten-year license term. In addition, we seek comment as to whether GWCS partitionees and disaggregatees should be afforded the same renewal expectancy as other GWCS licensees. We tentatively conclude that limiting the license term of the partitionee or disaggregatee is necessary to ensure that there is maximum incentive for parties to pursue available spectrum as quickly as practicable.

7. GWCS Competitive Bidding Issues

110. Unique competitive bidding issues, similar to those in broadband PCS, arise in the context of GWCS partitioning and disaggregation. Our competitive bidding rules for GWCS include provisions for installment payments and bidding credits for designated entities.²⁸⁵ We adopted rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special benefits.²⁸⁶ We tentatively conclude that GWCS partitionees and disaggregatees that would qualify as designated entities should be permitted to pay their *pro rata* share of the remaining government obligation via installment payments. We seek comment as to the exact mechanisms for apportioning the remaining government obligation between the parties and whether there are any unique circumstances that would make devising such a scheme for the GWCS service more difficult than for broadband PCS. Since GWCS service areas are allotted on a geographic basis, similar to broadband PCS, we propose using population as the objective measure to calculate the relative value of the partitioned area and amount of spectrum disaggregated as the objective measure for disaggregation.

111. We seek comment on whether to apply unjust enrichment rules to designated entity GWCS licensees that partition or disaggregate to non-designated entities. Commenters should address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area and amount of spectrum disaggregated as the objective measures. We further seek comment as to how to enforce unjust enrichment payments for designated entity GWCS licensees paying via installment payments and those that were awarded

²⁸³ See Notice at n.55.

²⁸⁴ See *supra* at ¶ 77.

²⁸⁵ See 47 C.F.R. § 26.210(a) - (b).

²⁸⁶ *GWCS Second Report and Order* at 664-5.

bidding credits that partition or disaggregate to non-designated entities. We tentatively propose using methods similar to those adopted for broadband PCS for calculating the amount of the unjust enrichment payments that must be paid in those circumstances.²⁸⁷

8. Licensing Issues

112. Partial assignment procedures are not used for cellular partitioning. Instead, whenever a cellular licensee enters into a partitioning agreement, the partitionee must file an application (FCC Form 600) for a new cellular system covering the partitioned market.²⁸⁸ Since this procedure provides the appropriate level of review of the partitioning transaction, we propose no modification at this time. However, should we permit cellular disaggregation, we seek comment on the method we should devise for reviewing cellular disaggregation transactions.

113. Since there are existing partial assignment rules for both cellular²⁸⁹ and GWCS,²⁹⁰ we propose utilizing partial assignment procedures, similar to those adopted for broadband PCS, to review cellular disaggregation and GWCS partitioning and disaggregation transactions. Partial assignment applications would be placed on public notice and subject to petitions to deny. The parties would be required to submit an FCC Form 490, an FCC Form 600 and, if necessary, an FCC Form 430, together as one package under cover of the FCC Form 490. We invite comment whether any additional procedures are necessary for reviewing these applications.

VI. CONCLUSION

114. The partitioning and disaggregation proposals we have adopted herein are consistent with a pro-competitive policy framework. These rules will eliminate barriers to entry for small businesses seeking to enter the PCS marketplace and will promote the rapid creation of a competitive market for the provision of PCS services. These rules also meet the Congressional objectives to further the rapid development of new technologies for the benefit of the public including those residing in rural areas, without administrative delay, to promote economic opportunity and competition, and to ensure that new technologies are available by avoiding excessive concentration of licenses.

²⁸⁷ See *supra* at ¶¶ 32-35.

²⁸⁸ See 47 C.F.R. § 22.947(b).

²⁸⁹ See 47 C.F.R. § 22.137(c).

²⁹⁰ See 47 C.F.R. § 26.324.

VII. PROCEDURAL MATTERS

A. Ordering Clauses

115. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 257, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(g), 303(r), and 332(a), Part 24 of the Commission's Rules, 47 C.F.R. § 24, IS AMENDED as set forth in Appendix B below.

116. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 257, 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(g), 303(r), and 309(j), a FURTHER NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

117. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE sixty days after date of publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 303(r), 309(j).

B. *Ex Parte* Rules -- Non-Restricted Proceedings

118. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1201, 1203, and 1.1206(a).

C. Comment Dates

119. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments to the *Further Notice of Proposed Rule Making* on or before February 10, 1997, and reply comments on or before February 25, 1997. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

D. Initial Paperwork Reduction Act of 1995 Analysis

120. The *Further Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite

the general public and the Office of Management and Budget to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rule Making*; OMB comments are due on or before 60 days after the publication in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

121. Written comments by the public on the proposed and/or modified information collections are due February 10, 1997. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after the publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to both of the following: Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet at fain_t@al.eop.gov. For additional information regarding the information collections contained herein, contact Dorothy Conway above.

E. Regulatory Flexibility Act

122. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. With respect to the *Further Notice of Proposed Rulemaking*, an Initial Regulatory Flexibility Analysis is contained in Appendix D. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared the Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the cellular and GWCS industries. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the *Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

F. Further Information

123. For further information concerning this proceeding, contact Shaun A. Maher, Esq. at (202) 418-0620, internet: smaher@fcc.gov, Legal Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A**Comments**

Ad Hoc Rural Telecommunications Group (RTG)
 AirGate Wireless, L.L.C. (AirGate)
 American Petroleum Institute (API)
 AT&T Wireless Services, Inc. (AT&T Wireless)
 BellSouth Corporation (BellSouth)
 Carolina Independents (Carolina Independents)
 Cellular Telecommunications Industry Association (CTIA)
 Center for Training and Careers (CTC)
 Century Personal Access Network, Inc. (Century)
 Cook Inlet Region, Inc. (Cook Inlet)
 GTE Service Corporation (GTE)
 Illuminet and the Independent Alliance (Illuminet)
 Industrial Telecommunications Association, Inc. (ITA)
 Liberty Cellular, Inc. (Liberty)
 Motorola, Inc.
 National Paging and Personal Communications Association (NPPCA)
 National Rural Telecommunications Cooperative (NRTC)
 National Telephone Cooperative Association (NTCA)
 NextWave Telecom, Inc. (NextWave)
 Omnipoint Corporation (Omnipoint)
 Opportunities Now Enterprises, Inc. (ONE)
 Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
 PCS Wisconsin, LLC
 Personal Communications Industry Association (PCIA)
 Rural Cellular Association (RCA)
 Sprint Spectrum L.P. (Sprint)
 SR Telecom, Inc.
 3 Rivers PCS, Inc. and Montana Wireless, Inc. (3 Rivers)
 United States Hispanic Chamber of Commerce
 United States Telephone Association (USTA)
 US West, Inc.
 UTC
 Western Wireless Corporation (Western Wireless)
 Yelm Telephone Company (Yelm)

Reply Comments

Ad Hoc Rural Telecommunications Group (RTG)
 Americall International, LLC (Americall)
 American Petroleum Institute (API)

AT&T Wireless Services, Inc. (AT&T Wireless)
Carolina Independents (Carolina Independents)
Industrial Telecommunications Association, Inc. (ITA)
Motorola, Inc.
Omnipoint Corporation (Omnipoint)
Organization for the Promotion and Advancement of Small Telecommunications Companies
(OPASTCO)
Personal Communications Industry Association (PCIA)
Rural Telephone Finance Cooperative (RTFC)
US West, Inc.
Wireless North, Inc.

APPENDIX B

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 24.229 is amended by deleting subsection (c). Revised Section 24.229 reads as follows:

Sec. 24.229 Frequencies.

The frequencies available in the Broadband PCS service are listed in this section in accordance with the frequency allocations table of of Section 2.106 of this chapter.

(a) The following frequency blocks are available for assignment on an MTA basis:

Block A: 1850-1865 MHz paired with 1930-1945 MHz; and

Block B: 1870-1885 MHz paired with 1950-1965 MHz.

(b) The following frequency blocks are available for assignment on a BTA basis:

Block C: 1895-1910 MHz paired with 1975-1990 MHz;

Block D: 1865-1870 MHz paired with 1945-1950 MHz;

Block E: 1885-1890 MHz paired with 1965-1970 MHz; and

Block F: 1890-1895 MHz paired with 1970-1975 MHz.

2. Section 24.707 is amended by removing the following parenthetical phrase from the third sentence: "(and applicants seeking partitioned licenses pursuant to agreements with auction winners under § 24.714)." Revised Section 24.707 reads as follows:

Sec. 24.707 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600, as modified, within ten (10) business days after being notified that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in Subpart I of this Part and § 1.2107 (c) and (d) of this Chapter and any associated Public Notices. Only auction winners will be eligible to file applications on FCC Form 600 for initial broadband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 600.

3. Section 24.714 is amended by replacing it with the following new Section 24.714:

Sect. 24.714 Partitioned Licenses and Disaggregated Spectrum

(a) Eligibility.

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 24.839.

(2) Broadband PCS licensees in spectrum blocks A, B, D, and E may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(3) Broadband PCS licensees in spectrum blocks C and F may not partition their licensed geographic service area or disaggregate their licensed spectrum for the first five years of the license term unless it is to an entity that meets the eligibility criteria set forth in § 24.709 at the time the request for partial assignment of license is filed or to an entity that holds license(s) for frequency blocks C and F that met the eligibility criteria set forth in § 24.709 at the time of receipt of such license(s). Partial assignment applications seeking partitioning or disaggregation of broadband PCS licenses in spectrum blocks C and F must include an attachment demonstrating compliance with this section.

(b) Technical Standards.

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) *Unjust Enrichment.*

(1) *Installment Payments.* Licensees in frequency Blocks C and F making installment payments that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in §§ 1.2111 and 24.716(d).

(2) *Bidding Credits.* Licensees in frequency Blocks C and F that received a bidding credit and partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in §§ 1.2110(f) and 24.717(c).

(3) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) *Installment Payments.*

(1) *Apportioning the Balance on Installment Payment Plans.* When a winning bidder elects to pay for its license through an installment payment plan pursuant to §§ 1.2110(e) or 24.716, and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the entire original license area calculated based upon the most recent census data. In the case of disaggregation, the balance shall be apportioned based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the licensed area.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder elects to pay for its license through an installment payment plan, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to § 24.714(d)(1).

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application.

(iii) The licensee shall be permitted to continue to pay its *pro rata* share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked "superseded" and returned to the licensee upon receipt of the new financing documents. The original interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation. We will require, as a further condition to approval of the partial assignment application, that the licensee execute and return to the U.S. Treasury the new financing documents within 30 days of the Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application.

(iv) A default on the licensee's payment obligation will only affect the licensee's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation, as calculated according to § 24.714(d)(1).

(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their *pro rata* portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market or disaggregated spectrum.

(iii) A default on an obligation will only affect that portion of the market area held by the defaulting party.

(iv) Partitionees and disaggregatees that qualify for installment payment plans may elect to pay some of their *pro rata* portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remaining portion of the balance due pursuant to an installment payment plan.

(e) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 24.15.

(f) *Construction Requirements.*

(1) *Requirements for Partitioning.* Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 24.203 for the partitioned license area; or

(ii) The original licensee may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in § 24.203, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in § 24.16(a), for the partitioned license area by the end of the original ten-year license term of the licensee.

(iii) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.

(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate five- and ten-year construction benchmarks set forth in § 24.203.

(v) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the five- and ten-year construction requirements for the PCS market as set forth in § 24.203. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

APPENDIX C

Final Regulatory Flexibility Analysis
Report and Order

As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 96-148.²⁹¹ The Commission sought written public comment on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²⁹²

A. Need for and Purpose of this Action:

In this *Report and Order* the Commission modifies the broadband PCS rules to permit partitioning and disaggregation for all Part 24 licenses. The proposals adopted herein also implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D) and to reduce entry barriers for small businesses in accordance with 47 U.S.C. § 257. With more open partitioning and disaggregation, additional entities, including small businesses, may participate in the provision of broadband PCS service without needing to acquire wholesale an existing license (with all of the bundle of rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a more flexible and less expensive alternative for entities desiring to enter these services.

B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:

Only one commenter, National Telephone Cooperative Association (NTCA), submitted comments that were specifically in response to the IRFA. NTCA argues that the Commission is required under the RFA to identify significant alternatives to the proposed rules in order to accomplish the stated objectives of Sections 309(j) and 257 of the Communications Act of 1934, as amended (Communications Act).²⁹³ Specifically, NTCA argues that the Commission must consider the right of first refusal approach suggested by some commenters as an alternative to allowing open partitioning of PCS licenses and how it might minimize significant economic impacts on rural telcos.²⁹⁴ NTCA contends that, for the purposes of determining which businesses

²⁹¹ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, FCC 96-287, *Notice of Proposed Rulemaking*, 11 FCC Rcd 10187 (1996) (*Notice*).

²⁹² Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) *codified at* 5 U.S.C. § 601 *et seq.*)

²⁹³ NTCA Comments at 7-9.

²⁹⁴ *Id.*

are to be included in an RFA analysis, the Commission should adopt the U.S. Small Business Administration's (SBA) definition of small business, which is any company with fewer than 1,500 employees.²⁹⁵

In the *Report and Order*, significant alternatives were identified and considered in order to further the mandates of Sections 309(j) and 257 of the Communications Act. In addition, significant consideration was given to the rural telcos' right of first refusal approach for partitioning; however, the Commission concluded that such an approach was unworkable and would actually discourage partitioning. Finally, the Commission declined to adopt NTCA's suggestion to utilize the SBA definition of small business (businesses with fewer than 1,500 employees). As noted below, the existing definition of small business (firms with revenues of less than \$40 million in each of the last three years) was used in the PCS C-Block auction and was approved by the SBA.²⁹⁶ We also note that we have found incumbent LECs to be "dominant in their field of operation" since the early 1980's, and we consistently have certified under the RFA that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses.²⁹⁷ We have made similar determinations in other areas.²⁹⁸

C. Description and Number of Small Entities Involved

The rules adopted in the *Report and Order* will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding broadband PCS licenses who choose to partition and/or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation. The rules will also affect rural telephone companies which, under the current rules, have the exclusive right to obtain partitioned broadband PCS licenses. Small businesses will be defined for these purposes as firms that have revenues of less than \$40 million in each of the last three calendar years. This definition was used in the PCS C-Block auction and approved by the SBA.²⁹⁹ The definition of "rural telephone company" shall be that definition found at Section 24.720(e) of the rules.

²⁹⁵ *Id.* at 8-9.

²⁹⁶ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5608, ¶ 175 (1994).

²⁹⁷ See, e.g., Expanded Interconnection with Local Telephone Company Facilities, *Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 5809 (1991); MTS and WATS Market Structure, *Report and Order*, 2 FCC Rcd 2953, 2959 (1987) (citing MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, 338-39 (1983)).

²⁹⁸ See, e.g., In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7418 (1995).

²⁹⁹ *Id.*

The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has auctioned broadband PCS licenses in blocks A, B, and C. The Commission does not have sufficient information to determine whether any small businesses within the SBA-approved definition bid successfully for licenses in the A or B block PCS auctions. There were 89 winning bidders that qualified as small businesses in the C block PCS auctions. Based upon this information, the Commission concludes that the number of broadband PCS licensees affected by the rules adopted herein includes the 89 winning bidders that qualified as small entities in the block C broadband PCS auctions.

The Commission anticipates that a total of 10,370 PCS licensees or potential licensees could take the opportunity to partition or disaggregate a license or obtain a license through partitioning and/or disaggregation. This estimate is based on the total number of broadband PCS licenses auctions and subject to auction, 2,074, and our estimate that each license would probably not be partitioned and/or disaggregated to more than five parties. Currently, the C and F block licensees and potential licensees (holding a total of 986 licenses) must be small businesses or entrepreneurs with average gross revenues over the past three years of less than \$125 million. Under the rules adopted in the *Report and Order*, they will be permitted to partition and/or disaggregate to other qualified entrepreneurs at any time and to non-entrepreneurs after the first five years of their license term. The A, B, D, and E block licensees and potential licensees (holding a total of 1,088 licenses) will also be permitted under the proposed rules to partition and/or disaggregate to small businesses.

The Commission is presently conducting auctions for the D, E, and F blocks of broadband PCS spectrum. The Commission anticipates that a total of 1,479 licenses will be awarded in the D, E, and F block PCS auctions. Eligibility for the F block licenses is limited to entrepreneurs with average revenues of less than \$125 million. It is not possible to estimate the number of licenses that will be awarded to small businesses in the F block nor is it possible to estimate how many small businesses will win the D or E block licenses. We believe that it is possible that small businesses will constitute a significant number of the up to 10,370 PCS licensees or potential licensees who could take the opportunity to partition and/or disaggregate or who could obtain a license through partitioning and/or disaggregation.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The rules adopted in the *Report and Order* will impose reporting and recordkeeping requirements on small businesses seeking licenses through partitioning and disaggregation. The information requirements will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be given in a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining

25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

E. Steps Taken to Minimize Burdens on Small Entities:

The rules adopted in the *Report and Order* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services and are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Allowing non-restricted partitioning of PCS licenses will facilitate market entry by parties who may lack the financial resources for participation in PCS auctions, including small businesses. Some small businesses may have been unable to be winning bidders at the PCS auctions due to high bidding and would have been unable to qualify for partitioning because of our current restriction which permits partitioning of PCS licenses to only rural telephone companies (rural telcos). By eliminating this restriction, small businesses will be able to obtain partitioned PCS licenses for smaller service areas at presumably reduced costs, thereby providing a method for small businesses to enter the PCS marketplace.

Similarly, allowing immediate disaggregation of PCS licenses will facilitate the entry of new competitors to the provision of PCS services, many of whom will be small businesses seeking to acquire a smaller amount of PCS spectrum at a reduced cost.

Allowing geographic partitioning of PCS licenses by service areas defined by the parties rather than only by county lines will provide an opportunity for small businesses to obtain partitioned PCS license areas designed to serve smaller, niche markets. This will permit small businesses to enter the PCS marketplace by reducing the overall cost of acquiring a partitioned PCS license.

Allowing disaggregation of spectrum in any amount will also promote participation by small businesses who may seek to acquire a smaller amount of PCS spectrum tailored to meet the needs of their proposed service.

The Commission's proposals to allow non-entrepreneur block licensees to partition or disaggregate to any party and to allow entrepreneurs to partition or disaggregate to other entrepreneurs at any time and to non-entrepreneurs after a five year holding period will significantly increase the opportunities for small businesses to enter the PCS marketplace. Allowing entrepreneur partitionees and disaggregatees to pay their proportionate share of the remaining government obligation through installment payments will provide a further opportunity for small businesses to participate in the provision of PCS services.

The Commission's decision to allow partitioning parties to choose between two construction requirements will provide small businesses with more flexibility to construct their

systems at a rate that is determined by market forces, thus allowing them to conserve their resources.

F. Significant Alternatives Considered and Rejected:

The Commission considered and rejected a number of alternative proposals concerning partitioning and disaggregation.

The rural telcos argued that the Commission should either retain the current partitioning restriction or adopt a right of first of refusal approach that would require partitioning parties to notify the rural telco and offer it the partitioned license area under similar terms and conditions.³⁰⁰ The Commission found that retaining the current partitioning restriction would prevent small businesses from using partitioning to enter the broadband PCS market. Since retaining the partitioning restriction would constitute a significant barrier to entry for small businesses, the Commission declined to continue to limit partitioning to rural telcos.³⁰¹

The Commission found that the right of first refusal would be difficult to implement and could discourage partitioning.³⁰² Areas proposed in partitioning agreements may not coincide exactly with areas for which a rural telco may have a right of first refusal. A single partitioning transaction may encompass more than one rural telco's service area, or a partitioning agreement may be part of a larger assignment transaction. Parties would be unwilling to enter into partitioning agreements not knowing how much of an area would ultimately be partitioned or whether they could consummate the transaction. This determination will make it easier for non-rural-telcos, including some small business entities, to enter partitioning agreements.

The Commission declined to adopt the proposal set forth in the *Notice* to limit partitioning to areas defined by county lines.³⁰³ The Commission was convinced by the majority of commenters that geographic partitioning along county lines is too restrictive. The Commission found that parties seeking a partitioned license may not desire to serve an entire county but rather a smaller niche market. Therefore, the Commission found that allowing partitioning along service areas defined by the parties would allow the parties to design flexible partitioning agreements.³⁰⁴

³⁰⁰ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-474, ¶¶ 8-11 (*Report and Order*).

³⁰¹ *Id.* at ¶¶ 13-18.

³⁰² *Id.* at ¶¶ 17-18.

³⁰³ *Id.* at ¶¶ 23-24.

³⁰⁴ *Id.* at ¶ 24.

The Commission rejected proposals to permit partitioning and disaggregation during the first five years of an entrepreneur's license term.³⁰⁵ While allowing entrepreneurs to immediately partition or disaggregate to non-entrepreneurs may have resulted in additional entities participating in the provision of PCS services, the Commission concluded that the five year holding period restriction is necessary in order to ensure that entrepreneurs do not take advantage of the special entrepreneur block benefits by immediately partitioning a portion of their licenses or disaggregating a portion of their spectrum to parties that would not have qualified at auction, on their own merits, for such benefits.³⁰⁶ Furthermore, limiting partitioning and disaggregation during the first five years of an entrepreneur's license term will increase the possibility that small businesses will be able to acquire PCS licenses.

The Commission declined to adopt proposals to apply a new license term to partitioned license areas and disaggregated spectrum.³⁰⁷ Under this approach, entities obtaining partitioned licenses or disaggregated spectrum would receive a new ten-year license term beginning from the date of the Commission approved the partitioning or disaggregation. The Commission found that permitting parties to "re-start" their license term would effectively allow a licensee to extend its license term and could lead to circumvention of our license term rules.

The Commission rejected the proposal to require disaggregation of broadband PCS spectrum in blocks of 1 MHz of paired frequencies (500 kHz plus 500 kHz).³⁰⁸ The Commission found that requiring parties to obtain that large a block of spectrum could act as a barrier to entry for entities that did not require that much spectrum to provide service.³⁰⁹

Finally, the Commission declined the proposal put forth by some commenters that PCS licensees be required to assume the obligations and responsibilities for microwave relocation costs for their entire license area and spectrum block even if they partition a portion of their license area or disaggregate a portion of their spectrum to another party.³¹⁰ The Commission found that requiring licensees to guarantee the payments of partitionees and disaggregatees would be unfair because licensees would not have control over the actions of partitionees and disaggregatees and because there was no reason to treat those parties differently than other late-entrant PCS licensees with respect to microwave relocation costs.³¹¹

³⁰⁵ *Id.* at ¶¶ 31, 53.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at ¶¶ 77-78.

³⁰⁸ *Id.* at ¶ 49.

³⁰⁹ *Id.*

³¹⁰ *Id.* at ¶ 89.

³¹¹ *Id.*

G. Report to Congress

The Commission shall include a copy of this Final Regulatory Flexibility Analysis, along with this *Report and Order*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

APPENDIX D

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Further Notice of Proposed Rulemaking

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Further Notice of Proposed Rulemaking (Further Notice)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* as provided in section VII(C).

Reason for Action: This rulemaking proceeding was initiated to secure comment on proposals to modify our cellular and General Wireless Communications Service (GWCS) rules to permit partitioning and disaggregation for all licensees in those services. The proposals advanced in the *Further Notice* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Sections 257 and 309(j) of the Communications Act of 1934, as amended (the Communications Act).³¹²

Objectives: The Commission proposes to change its rules for cellular and GWCS to facilitate the efficient use of cellular and GWCS spectrum, increase competition, and expedite the provision of cellular and GWCS services in the near term. These proposals seek to increase the level of small business participation in the provision of cellular and GWCS services. The Commission considers whether to modify the existing cellular rules to provide for more flexible partitioning and to allow disaggregation of cellular spectrum for the first time. In addition, the Commission proposes to allow GWCS licensees to partition and disaggregate to entities that are eligible for GWCS licenses. Designated entity GWCS licensees will be allowed to partition or disaggregate to non-designated entities, subject to unjust enrichment payments. Entities that qualify for installment payments will be permitted to pay their *pro rata* share of the remaining government obligation via installment payments. The Commission proposes to establish license terms that permit cellular and GWCS partitionees to hold partitioned licenses and disaggregatees to hold disaggregated spectrum for the remaining duration of the original ten-year license term. The Commission also proposes to establish construction requirements for GWCS partitioning to ensure expedient access to GWCS service in partitioned areas, to ensure coverage and to increase spectrum efficiency. Finally, the Commission proposes to allow combined partitioning and disaggregation for cellular and GWCS services and to follow the existing partial assignment procedures for cellular and GWCS.

³¹² 47 U.S.C. § 257, 309(j).

Legal Basis: The proposed action is authorized under Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended.³¹³

Reporting, Recordkeeping, and Other Compliance Requirements: The proposals under consideration in this *Further Notice* include the possibility of imposing reporting and recordkeeping requirements on small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine whether the licensee was qualified to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by an applicant requesting cellular disaggregation or GWCS partitioning or disaggregation. This information will be submitted on FCC Forms 490 (and 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. We estimate that the average burden on the applicant is three hours for the information necessary to complete these forms. We estimate that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. We estimate that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: The rule changes proposed in this proceeding will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding cellular licenses who choose to partition and/or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total cellular and GWCS entities, existing and potential, would be affected by the proposed rules in the *Further Notice*. In particular, we seek estimates of how many cellular and GWCS entities, existing or potential, will be considered small businesses. "Small business" is defined here as a firm that has revenues of less than \$40 million in each of the last three calendar years. This definition was adopted for the GWCS service.³¹⁴ We seek comment as to whether this definition is appropriate in this context. Additionally, we request each commenter to identify whether it is a small business under this definition. If the commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The Commission anticipates that a total of 8,465 cellular licensees or potential licensees could take the opportunity to partition or disaggregate a license or obtain a license through

³¹³ 47 U.S.C. §§ 154(i), 303(r) and 309(j), as amended.

³¹⁴ Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 662, ¶ 95 (1995) (*GWCS Second Report and Order*).

partitioning and/or disaggregation. This estimate is based upon the current number of existing cellular licensees (1,693) and our estimate that each license would probably not be partitioned and/or disaggregated to more than five parties. We estimate that a significant number of the cellular and GWCS licensees and potential licensees who take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

SBA has not developed a definition of small entities specifically applicable to cellular. The closest applicable definition under SBA rules is radiotelephone (wireless) companies. According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.³¹⁵ According to our most recent data, there are 1,693 existing cellular licensees. We are unable at this time to estimate the number of cellular service carriers that would qualify as small business concerns under SBA's definition. We estimate that fewer than 1,693 small entity cellular service carriers may be affected by the decisions and rules adopted in this *Further Notice*.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The proposals advanced in the *Further Notice* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The impact on small entities in the proposals in the *Further Notice* is the opportunity to enter the cellular and GWCS market through partitioning and disaggregation. With more open partitioning and disaggregation, additional entities, including small businesses, may participate in the provision of cellular and GWCS services without needing to acquire wholesale an existing license (with all of the bundle of rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a more flexible and less expensive alternative for entities desiring to enter these services.

The rule changes proposed in the *Further Notice* by the Commission are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for small business in the provision and ownership of telecommunications services, and the mandate under Section 309(j) of the Communications Act, to utilize auctions to ensure that small, minority and women-owned businesses and rural telcos have an opportunity to participate in the provision of spectrum-based services. The proposals in the *Further Notice*, if implemented, will facilitate market entry by parties, including small businesses, that may lack the financial resources for participation in cellular and GWCS services. The alternative is to continue to allow GWCS partitioning only for rural telcos. Limiting GWCS partitioning to rural telcos would not permit other small businesses to obtain partitioned licenses or to partition to other parties, and thus would not promote the participation of small business in the provision of GWCS service.

In the *Further Notice*, the Commission proposes facilitating GWCS partitioning by offering a choice between two different build-out options, which could be negotiated by the parties. The Commission tentatively concludes that these proposed flexible build-out

³¹⁵ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

requirements, if adopted, will encourage partitioning to entities that have a sincere interest in providing GWCS service and will thereby expedite the provision of service to geographic areas that otherwise may not receive it as quickly.

This *Further Notice* solicits comments on a variety of proposals discussed herein. Any significant alternatives presented in the comments will be considered.